BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of, the Appeal of )
)
IDELLA I. BROWNE )

For Appellant: Virgil R. Dalby
Attorney at Law

For Respondent: Crawford H. Thomas
Chief Counsel

Noel J. Robinson
Counsel

## O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of'the Franchise Tax Board on the protest of Idella I. Browne against proposed assessments of additional personal income tax in the amounts of $867.08 and $534.13 for the years 1968 and 1969, respectively. Since the filing of this appeal,the Franchise Tax Board has conceded that the additional tax assessments should be reduced to $553.52 and $187.17 for the respective years.

The issue raised by appellant is whether respondent should be estopped from assessing the tax in view of advice it previously gave concerning the tax liability of appellant's deceased spouse.

Appellant and her husband, Robert E. Browne, who were California residents, separated in 1967. In January of 1968 Mr. Browne left his position with the State Department of Education and accepted employment with the United States Agency for International Development in El Salvador. He returned to California in late August of 1969 and was, thereafter, employed as a teacher with the Del Paso School District in this state. During Mr. Browne's absence from California appellant resided here, had no contact with her husband, and did not know the amount of his earnings. After Mr. Browne's return to this state, appellant initiated a divorce action and approximately the middle of November 1969 obtained an interlocutory divorce decree. Mr. Browne died February 26, 1970, before appellant acquired a final decree. Appellant, also a teacher in this state, filed separate California returns for 1968 and.1969, reporting and paying tax on all her earnings but on none of her husband's earnings. Mr. Browne did not file for 1968; nor was a return filed in his behalf for 1969 by appellant, the executrix of his estate.

On June 18, 1971, while Mr. Browne's estate was being probated in Sacramento County, counsel for appellant in that proceeding, now a partner of appellant's present counsel, wrote respondent. He explained that his only information was that in May of 1970 decedent's executrix received two salary checks from the school district aggregating $1,397. 61. He asked whether decedent had a tax liability for 1969 and 1970, and, if so, requested respondent to compute it. On July 28; 1971, counsel again.wrote respondent and said that by. a recent telephone call from the latter's office,. he was informed that decedent's tax liability was $1, 803. 23. He explained that creditors had filed formal claims aggregating $3, 000. 00 and had agreed to accept pro rata payment before discovery that a state obligation might be outstanding. He asked how the matter should be handled so that the estate could be closed. Respondent denies making any such telephone call or tax computation.

Respondent answered this second letter on August 6, 1971, indicating that because of information furnished by counsel two days previously on the telephone, and in his June letter, it appeared that decedent's income did not exceed taxable minimums while a resident in either 1969 or 1970. Respondent advised counsel that the executrix would not have to file a return for either year in behalf of the decedent.

Thereafter, on November 1, 1971, counsel again wrote. respondent stating he had been told by it that decedent had a tax deficiency for 1968. This letter was made part of the record and contained the following handwritten notations: "Interlocutory decree of divorce in Nov. 1969. No final - H died." "Talked with McKenzie [counsel for executrix] told him the decedent did not file 68 - was a nonresident. 12/20/71." Subsequently, $1,065.17 was distributed to two unsecured creditors of the estate, with nothing paid to respondent. A decree of final distribution recited that all California income taxes had been paid.

Subsequently, as the result of an audit, respondent determined that all of Mr. Browne's 1968 and 1969 earnings were community property, one half of which was taxable as appellant's income. Initially, respondent estimated decedent's earnings as $20,000.00 each year in computing the proposed assessments. While the matter was under protest, appellant's present counsel advised respondent that decedent's actual earnings were $22,479.00 for 1968 and $14,568.00 for 1969. No change was then made in the proposed tax assessment for 1968 but the proposed assessment for 1969 was revised downward because of the figures submitted.

After the filing of this appeal, respondent made a concession. It has now allocated one half of appellant's earnings for both years to decedent as community income in accordance with appellant's contention to that effect at the protest level. Respondent, however, considers appellant as liable for payment of the taxes owed by the decedent on this income pursuant to section 18555 of the Revenue and Taxation Code inasmuch as she received this income and controlled its disposition. Nevertheless, by treating it in this manner the amount of tax involved is considerably less than the amount proposed to be assessed before this

appeal. Respondent has also increased appellant's one half share of decedent's community earnings in 1968 in view of decedent's actual earnings for that year. The net reduced tax assessments now proposed by respondent are shown in the first paragraph of this opinion.

Turning to the applicable law, we must first determine if the earnings of the husband while outside this state actually constituted community property. If those earnings were his separate income, taxing appellant on one half thereof would obviously be incorrect. It is well settled that marital property interests in personal property are determined under the laws of the acquiring spouse's domicile. (Schecter v. Superior Court, 49 Cal. 2d 3, 10 [314 P. 2d 10]; Rozan v. Rozan, 49 Cal. 2d 322, 326 [317 P. 2d 11]; Appeal of Estate of Eleanor M. Gann, Cal. St. Bd. of Equal., Dec. 13, 1971. )

Although decedent was absent from California for approximately 19 months, and presumably a nonresident for that period, the record does not indicate that he ever ceased to be a California domiciliary. Appellant does not argue otherwise. Therefore, the character of Mr. Browne's earnings while in El Salvador is controlled by California law. Consequently, such income was community property in which appellant held an equal interest. (Civ. Code, §§ 161a, 163, 164.) 1/ She is thereby liable for income tax on her one half community interest in those earnings even though the parties were not living together and even though she did not receive any part of them. (Appeal of Neil D. and Carole C. Elzey, Cal. St. Bd. of Equal., Aug. 1, 1974; Appeal of Ann Schifano, Cal. St. Bd. of Equal., Oct. 27, 1971; Appeal of Beverly Bortin, Cal. St. Bd. of Equal., Aug. 1, 1966; Appeal of Esther Zoller, Cal. St. Bd. of Equal., Dec. 13, 1960. )

1/ All references are to Civil Code provisions in effect during the years on appeal. Since that time, the sections have been renumbered and, in many instances, there have been substantive changes.

We next consider appellant's claim of estoppel. As a general rule, estoppel will not be invoked against the government or its agencies in tax matters except in rare and unusual circumstances; the case must be clear and the injustice great. (United States Fidelity & Cuaranty Co. v. State Board of Equalization, 47 Cal. 2d 384 [303 P. 2d 1034]; see also California Cigarette Concessions, Inc. v. City of Los Angeles, 53 Cal, 2d 865 [3 Cal. Rptr. 675; 350 P. 2d 715]. ) Appellant contends that respondent erroneously informed her representative that no tax liability was owed by decedent. Relying on this advice, Mr. Browne's estate was distributed without paying any state income taxes owed by him. Appellant maintains that this alleged misinformation is causing her to pay taxes that should have been paid by the estate.

The exchange of correspondence indicates that respondent considered Mr. Browne a nonresident while in El Salvador. This conclusion was reasonable because he was apparently outside this state for other than a temporary or transitory purpose. (Rev. & Tax. Code, §§ 17014, 17015. ) Consequently, he was not subject to tax on his earnings in El Salvador inasmuch as their source was not in this state. (Rev. & Tax. Code, § 17041. ) Respondent simply did not furnish erroneous advice with respect to decedent's out-of-state earnings. Even if respondent had erroneously advised that decedent was liable for tax on one half of those community earnings, there would have been no reliance thereon to the detriment of appellant, inasmuch as she still would be liable for tax on her one half share.

Next we must consider whether an estoppel is raised by respondent's failure to advise decedent's estate of its liability for tax on one half of any of appellant's earnings constituting community income. Appellant's earnings appear to have been community income (except for a short period in 1969, as noted hereafter). As such, decedent's estate would have been liable for tax on one half thereof. However, if the cause of their separation in 1967 was a marital rupture causing a parting of the ways and there was no intention of ultimately resuming marital relations and living together, the earnings would have been her separate property. (Civ. Code, § 169; see Makeig v. United Security Bank & Trust Co., 112 Cal. App. ,138 [296 P. 673]. ) The written correspondence upon which appellant relies does not clearly establish that respondent was advised at that time as to the

nature or extent of appellant's earnings. Furthermore, the record does not indicate that respondent was informed of all the circumstances concerning the separation. Based on the record, we cannot conclude that respondent provided faulty information. Therefore, appellant is not entitled to invoke the doctrine of estoppel. (See Appeal of Esther Zoller, supra. ) We note also that the three cases cited by appellant relating to estoppel were not tax cases, and in one of them the doctrine was not applied.

However, we cannot agree with the precise amount of respondent's tax adjustment for the year 1969. Under former section 169. 2 of the Civil Code, after rendition of an interlocutory judgment of divorce and while the parties are living separate and apart, the earnings of the husband are his separate property. Respondent included $7, 284. 00, one half of Mr. Browne's 1969 earnings; as appellant's taxable one-half share of community income. Appellant's representative has reasonably approximated that one eighth of decedent's 1969 earnings ($1, 821. 00) was earned after rendition of the interlocutory judgment. Consequently, we believe that this amount was all Mr. Browne's, separate property and should not be partially apportioned as income to appellant. Therefore, the income allocable to appellant from decedent's community earnings for 1969 should be reduced by $910.50.

As already explained, since the appeal respondent has also allocated one half of appellant's total earnings for 1969 to decedent as his share of community income. Section 18555 of the Revenue and Taxation Code provides that the spouse controlling the disposition of or who receives community income as well as the spouse taxable on such income is liable for payment of taxes on such income. Accordingly, respondent considered appellant as liable for payment of decedent's lesser tax liability on this allocated sum. However, we believe that appellant's earnings after the interlocutory decree should be considered as earned while she was living "separate from her husband, " within the meaning of former section. 169 of the Civil Code, as that langu-age was

construed in Makeig, supra. Such earnings were thereby her separate property pursuant to that section. Appellant's state tax return showed her earnings as $11,157.00 for 1969. It is reasonable to assume that one eighth thereof ($1,394.63) was earned after the interlocutory decree, and therefore should all be allocated to appellant as her separate property. The balance ($9,762.37) may properly be treated as community income to be taxed by the method used by respondent.

Consequently, appellant's tax liability for the year 1969 should be recalculated in accordance with the income revisions shown above. The net result will reduce the tax to some degree below $187.17. The proposed tax assessment for the year 1968 should be revised in accordance with respondent's concession.

## O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Idella I. Browne against proposed assessments of additional personal income tax in the amounts of $867.08 and $534.13 for the years 1968 and 1969, respectively, be modified in accordance with the concession of the Franchise Tax Board and further adjusted for 1969 pursuant to the views expressed in this opinion. In all other respects the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 18th day of March, 1975, by the State Board of Equalization.

John W. Lynch, Chairman

Member

Member

Member

Member

ATTEST: Charles H. Ullman, Acting Secretary